Throughout this process, anyone who disputes any formal decision with respect to a proposed standard has a right to appeal. *IEEE Standards Companion* (2003), http://standards.ieee.org/guides/companion/. There are two types of appeals: procedural and technical. *Id.* Technical appeals, filed prior to the approval of a standard, are returned through the sponsor to the working group for evaluation and handling. *Id.* Procedural appeals are heard by the Standards Board, through a panel established by it. *Id.* A written record is made of all appeals, procedural and technical.

II. THE STANDARDS AT ISSUE WERE DEVELOPED IN FULL COMPLIANCE WITH THE IEEE'S RIGOROUS PROCEDURES

A. The C95.1-1991 and C95.3-1991 Standards Are the Products of a Balanced, Lengthy, and Thorough Development Process

The C95.1-1991 standard at issue sets forth recommended human exposure limits to electromagnetic fields in a specific frequency range. *See Exposure Standard* at 4-11.[4] The C95.3-1991 standard specifies techniques and instrumentation for the measurement of electromagnetic fields, including the recommended methods to measure and determine the specific absorption rate ("SAR") of RF energy in humans exposed to electromagnetic fields. *See Measurement Standard* at 45-63.

Although the IEEE approved these standards in 1991, they have a long history that dates from research and studies

[4] The C95.1-1991 and C95.3-1991 standards are published by and are publicly available through the IEEE.

on biological effects of RF exposure begun in the 1940's and 1950's. In approximately 1960, ANSI (then the American Standards Association),[5] along with the Department of the Navy and the Institute of Radio Engineers (now the IEEE), initiated the Radiation Hazards Standards project. R.C. Petersen, *Radiofrequency Safety Standard-Setting in the United States*, *in* Electricity and Magnetism in Biology and Medicine 761, 761 (Ferdinando Bersani ed., 1999) (hereinafter *Petersen*). That project, in turn, established Committee C95, which was charged with developing RF/microwave safety standards. *See* J.M. Osepchuk & R.C. Petersen, *Historical Review of RF Exposure Standards and the International Committee on Electromagnetic Safety (ICES)*, 6 Bioelectromagnetics Supplement S7, S8 (2003), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/106565259/PDFSTART (hereinafter *Historical Review*). Committee C95 published its first standard in 1966, which was approved as an ANSI standard. *Id.* The Committee made further revisions in 1974 and 1982, both of which were also approved as ANSI standards. *Id.*

Committee C95 began developing revisions to the 1982 ANSI standard shortly after that standard was approved. In approximately 1988, ANSI stopped sponsoring such committees. *Id.* at S11. Committee C95 nevertheless continued its work as an ANSI-accredited committee, and in approximately 1990, the IEEE assumed sponsorship for it and redesignated it as IEEE SCC 28. *Id.* at S8. SCC 28 was an interdisciplinary committee consisting of experts in a broad range of fields, including engineering, medicine, and research, drawn from academia, government, industry, and user groups. Dr. Thomas F. Budinger, M.D., a member of

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[5] ANSI has also submitted an *amicus* brief in support of the petition for *certiorari*.

the National Institute of Medicine, was named Chair of the new SCC 28. *Id.* at S11.

The day-to-day work on the two standards was performed by two SCC 28 subcommittees, SC-4 (for the C95.1-1991 standard) and SC-1 (for the C95.3-1991 standard). SC-4 was comprised of approximately 125 members. Of those 125 members, ninety were involved in research, twelve worked in industry; four were industry consultants, five were with government agencies, and fourteen were independent consultants or members of the general public. *Id.* at S9; *Petersen* at 762.

SC-4 critically and exhaustively examined the scientific literature on RF bioeffects through its own working subgroups. Initially, the Literature Surveillance Group of SC-4 selected a subset of relevant articles from the thousands of papers related to that subject matter. *Petersen* at 762. The Literature Surveillance Group rejected articles that were not peer-reviewed to determine their worthiness for scientific publication. From the remaining population of peer-reviewed studies, the Literature Surveillance Group placed greater emphasis on including more recent publications, which were likely to reflect the latest scientific findings; those that presented significant findings (positive or negative) on issues of public health; and those relevant to concerns expressed by citizen groups. If several studies showed adverse health effects, the Literature Surveillance Group selected those showing effects at the lowest exposure levels or with the longest exposure duration. This winnowing process yielded a body of 321 articles for further examination. *Id.*

Specialized working groups of SC-4 such as the Engineering Validation and Biological Validation Groups next evaluated in detail the scientific results described in the

321 selected articles. *Id.* at 762-63. Evaluation criteria included relevance to the standard, scientific quality and originality, and data reliability. *Id.* at 763. A separate Statistical Evaluation Group evaluated articles that employed questionable statistical methods. *Id.* This process produced a final standards database of 119 relevant peer-reviewed studies and papers. *Exposure Standard* Annex B. A Risk Assessment Group then evaluated the human exposure risks implicated by those studies. *Petersen* at 763.

Although IEEE procedures did not require formal balloting at the working group level, SC-4 nevertheless followed strict balloting procedures similar or identical to those for a sponsor's approval of the standard. The SC-4 balloting group consisted of the entire SC-4 membership, which voted on numerous drafts of the proposed standard before submitting its final version to SCC 28 for formal balloting.

The SCC 28 balloting group had thirty-six individual members: six worked in applied research; eight were engaged in basic research; five worked in industrial or commercial businesses; eleven were categorized as administrative, including some affiliated with the United States military (Army, Air Force, and Navy); and the remaining six were consultants and other interested parties. Three from the group were with the U.S. Food & Drug Administration. IEEE Standards Board Form for Submittal of Proposed Standards, C95.1 submitted by Ronald C. Petersen (August 14, 1991) (hereinafter "*Submittal Form C95.1*") (on file with the IEEE).

The SCC 28 balloting group initially approved the standard by the required affirmative vote of seventy-five percent of the ballots cast. Letter from Ronald C. Petersen, Acting Secretary, SCC 28, to the Voting Membership, SCC

28, (undated) (on file with the IEEE). Because, however, there were five negative votes, SCC 28 formed a Negative Ballot Committee to address those votes. *Id.* That Committee consisted of six members, including two of the individuals who cast negative votes. *Id.* After further deliberation and consultation, the Negative Ballot Committee proposed a slight revision to the draft standard and submitted a new ballot, with the proposed revision, to all ballot committee members. *Id.* The balloting committee thereafter approved the standard with thirty affirmative votes and two negative votes. Four members, all affiliated with the U.S. military, did not return their ballots. *Submittal Form C95.1.*

The C95.3-1991 standard, which was developed by SC-1 in conjunction with the C95.1-1991 standard, followed the same rigid due process procedures. The final balloting group comprised a balanced group of thirty-six individuals. IEEE Standards Board Form for Submittal of Proposed Standards, C95.3 submitted by Ronald C. Petersen (May 14, 1991) (on file with the IEEE). Thirty-one of the thirty-six ballots sent were returned, and twenty-nine of those were affirmative votes. The remaining two were abstentions. *Id.*

The IEEE Standards Board approved the revisions of IEEE Std C95.1-1991 and IEEE Std C95.3-1991 on September 26, 1991. ANSI approved the C95.3-1991 standard on May 6, 1992, and the C95.1-1991 standard on November 18, 1992.

B. Even After Their Approval, the C95.1-1991 and C95.3-1991 Standards Continued to Undergo Review and Revision in Accordance with the IEEE's Formal Standards-Development Requirements

SCC 28, which has grown over the years and is now named the International Committee on Electromagnetic Safety ("ICES"), continued to review scientific data and studies relating to the potential health and biological effects of RF electromagnetic fields throughout the 1990's and up to the present. *See generally Historical Review*. As with the initial standards-development process, this ongoing review process was open to all interested parties, including Respondents and their experts. As a result of this effort, the Standards Board reaffirmed the C95.1-1991 standard in 1997, and in 1998 it approved C95.1a, a supplement to the standard. Similarly, the Standards Board approved a revised C95.3-1991 on December 11, 2002. IEEE Std C95.3-2002. Most recently, the Standards Board approved a further revised Exposure Standard, IEEE Std C95.1-2005, which will soon undergo the ANSI review, approval, and appeal process. All of these revisions were voted on and approved in accordance with the IEEE requirements and procedures described herein.

III. THE FOURTH CIRCUIT'S DECISION SERIOUSLY HARMS THE PUBLIC INTEREST BY PERMITTING MULTIPLE JURIES AND COURTS TO SUBSTITUTE THEIR JUDGMENTS ON HEALTH AND SAFETY MATTERS FOR CAREFULLY DEVELOPED, SCIENCE-BASED CONSENSUS STANDARDS

The hundreds of unpaid volunteers who developed and approved the IEEE standards went to extraordinary lengths to ensure that those standards were based on the best

scientific evidence available. They spent countless hours reviewing and analyzing hundreds of scientific studies, and countless more hours drafting, discussing and debating the content of the standards themselves. They considered evidence and arguments from all constituent groups of affected parties, and they responded to every negative vote on the standards. Due process was ensured at every step of the process, which culminated in ANSI approval of the standards as American National Standards.

The public interest is best served by health and safety standards based on the best available scientific evidence, not on fear, conjecture, and unproven assertions. The process followed by the IEEE is widely recognized as being sound, balanced, and fair. Indeed, the IEEE standards themselves are neither mandatory nor binding on any entity, but because they reflect a consensus, fairly and openly reached, of a broad range of experts, they instill confidence in policy makers, regulators, and the public.

The decision below, if allowed to stand, would permit individual federal and state courts around the country to second-guess those standards and independently decide what is or is not adequate to protect the public health and safety. In essence, the decision below would allow lay juries and judges in each and every court around the country to substitute their judgments—based solely on whatever evidence litigants are able to present—for the consensus standards arrived at by the work of hundreds of experts and volunteers over a more than eight-year period. This is a particularly unnecessary, inefficient, costly, and unpredictable method to protect the public safety.

The development of the standards at issue were open to public observation and participation. Respondents and their experts had ample opportunity to challenge any aspect

of the standards at various stages before and after their adoption. Moreover, respondents and their experts were free to participate in the ongoing work of SCC 28 from 1991 through the present, including the various revisions to the standards. They were also free to participate in the FCC rulemaking process that led to the regulations at issue. Accordingly, there is no reason to allow them now to collaterally attack those regulations and standards.

In addition, the risk of inconsistent judgments in the litigation process is enormous. Some courts may decide that the standards are not adequate, while others may hold to the contrary. The result could be either court-ordered standards that are too costly to comply with or, much worse, standards or other requirements that, while seemingly more stringent, may actually increase the risks to the public health and safety. *See, e.g.*, Pet'r App. at 71a n.23 (citing the district court's observation that RF shields for cellular telephones may actually increase human exposure to RF energy.) In either event, such inconsistent judgments will increase public confusion and decrease public confidence in <u>any</u> standard.

Allowing such collateral attacks on voluntary safety standards and federal regulations based on them is also hugely costly and a waste of judicial resources. It is especially costly to nonprofit SDO's such as the IEEE. The IEEE has already been named as a defendant in seven pending tort cases in which the plaintiffs directly attack the adequacy of the IEEE standards at issue. The risk of such litigation could deter voluntary SDO's such as the IEEE from continuing their standards-related work. Indeed, ANSI reportedly ceased its standards sponsorship activities in 1988 at least in part because of the risk of litigation liability. *Historical Review* at S11.

Moreover, even if the IEEE and other SDO's could bear the potentially crippling cost of defending their standards in court after court around the country, there is still the substantial risk that such litigation could deter experts from devoting their time and talents to a process that may be endlessly litigated and ultimately ignored. Without expert volunteers, neither the IEEE nor other voluntary standards-development organizations can develop any standards.

The loss of private, consensus standards-development organizations would be a serious blow to the public interest. In 1998, the federal Office of Management and Budget promulgated Circular No. A-119, issued pursuant to the National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12, 110 Stat. 775, 782-783 (codified at 15 U.S.C. § 272 (1996)). That Circular explicitly notes the benefits of federal agency use of privately developed consensus standards in fulfilling the agency's mission. Those benefits include elimination of the Government's cost of developing its own standards; provision of incentives and opportunities to establish standards that serve national needs; encouragement of long-term growth for U.S. enterprises and promotion of efficiency and economic competition through harmonization of standards; and furtherance of the policy of reliance on the private sector to supply Government needs. OMB Circular No. A-119 (revised), Feb. 10, 1998, at ¶ 2. Accordingly the Circular expressly "directs [federal] agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical." *Id.* at ¶ 1. The Circular also expressly states that "[a]ll federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical." *Id.* at ¶ 6 (emphasis added).

The IEEE standards at issue represent the best effort of the entire affected scientific community to establish consensus, science-based standards that protect the public health and safety. There were ample opportunities for any person, entity, or expert to observe, participate in and challenge their adoption. The decision of the Fourth Circuit, if allowed to stand, would undermine the private consensus standards-development process and the many invaluable benefits and protections to the public that it provides.

CONCLUSION

For the foregoing reasons, the IEEE respectfully submits that this case is one of exceptional importance that merits review by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NOKIA INC., *et al.*,

Petitioners,

v.

GARRETT NAQUIN, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PARTIES TO THE PROCEEDING

In the Brief for Respondents in Opposition, Respondents suggested that four of the named Petitioners lacked standing. They have since withdrawn that contention. *See* Letter from H. Thomas Howell, Counsel for Respondents, to the Hon. William K. Suter, Clerk, Supreme Court of the United States (October 10, 2005). Thus, the statement of parties to the proceeding in the Petition is accurate and remains unchanged.

CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *iv* of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

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I. THE OPPOSITION ACTUALLY HIGHLIGHTS THE NEED FOR THIS COURT'S REVIEW.

Respondents spend the majority of their Opposition engaged in a futile effort to defend the merits of the Fourth Circuit decision. What they cannot deny is that a divided panel of the Fourth Circuit decided issues of national importance, and that the decision below conflicts with the position of the Federal Communications Commission ("FCC"), the considered views of other courts of appeals, and this Court's own recent decisions on federal preemption by agency rule. Nor can Respondents deny that the issues presented by the Petition, including the meaning and application of the "presumption against preemption," and the proper relationship between express and implied preemption, are important questions of federal law that have divided the Members of this Court and the courts of appeals.

As the numerous briefs *amicus curiae* in support of certiorari demonstrate, these issues transcend the context in which they are presented, and implicate the power of any federal agency to promulgate uniform national standards pursuant to Congressional mandate. The Opposition's attempt to recast the complaint as a garden variety breach of warranty action and to run away from the actual holding of the panel opinion is factually inaccurate and belied by both the dissent below and the careful opinion of the district court. For these reasons, discussed more fully below, the Petition for a Writ of Certiorari should be granted.

1. The Opposition does not and cannot seriously contest the national importance of the issues raised by the Fourth Circuit's decision. The lower court's rejection of uniform national standards in the area of interstate communication by radio threatens not only the efficient operation of the Nation's wireless infrastructure, but countless other regulatory regimes where the primacy of federal law has heretofore been unquestioned. Chamber Br. 15-16 (listing cases). As the Petition

demonstrates (without rejoinder), the recognition that the technical standards governing interstate communication by radio must be uniform and must transcend state and local boundaries dates back nearly a century. Pet. 4, 24. Since at least the Radio Act of 1927, Congress has recognized that the federal government must maintain exclusive control of the airwaves, that it must do so through centralizing control in an expert federal agency, and that such control must include plenary authority over licensing, signal strength, and the design and operation of the equipment used. Pet. 5-9; CTIA Br. 7-11.

There is an equally long history of federal preemption of *any* attempt at state regulation in this area. Both the court below and the Opposition attempt to cast this federal presence as isolated pin pricks of federal preemption in a field otherwise open to state regulation. This approach, which the Chamber of Commerce aptly labels the "'*expressio unius*' rule of preemption," Chamber Br. 13, can be used to fractionate even the most pervasive of federal regulatory schemes. Like Washington State's attempts to regulate the technical and operational characteristics of oceangoing tankers, *see Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 177-78 (1978) *and United States v. Locke*, 529 U.S. 89, 100 (2000), the decision below thrusts states into a role they have never played before—direct regulation of the design and operation of an important channel of interstate communication. *See* Pet. 20-21.

Nor can the Opposition seriously dispute the importance of the wireless network to national security, public safety, and our Nation's economy or the harm that disparate state design and operational standards would do to this critical piece of national communications infrastructure. Respondents do not even confront the FCC's conclusion that interstate interoperability is a central goal of federal wireless policy and that any form of additional state regulation of technical standards would interfere with that goal. *See Use of the Bands 824-845 MHz and 870-890* MHz, 89 F.C.C.2d 58,

91, ¶ 81 (1982) ("It is imperative that no additional requirements be imposed by the states which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service."). Respondents simply cannot deny that their lawsuit attempts to impose "additional requirements" on wireless telephones and that those requirements are based on a rebalancing of priorities that are explicitly embodied in the FCC's decision as to where to draw the regulatory line in the area of RF emissions.

Respondents argue that the relief sought – a request for a headset requirement – somehow militates against federal preemption here. Opp. 16. But, as the Petition and the district court opinion made clear, it is the *theory of liability itself that conflicts with federal law.* The gravamen of the complaint is that wireless telephones emit unsafe RF levels and that a headset mandate and literature informing consumers that a headset enhances RF safety are necessary remedies. As the Fourth Circuit quite candidly recognized, that theory of liability requires the state court to conduct its own "risk/utility" balance and arrive at a conclusion different from that reached by the federal agency. App. 19a-20a. Nothing in the lower court's opinion places any limit on the state court's remedial power once it has found that FCC-certified wireless telephones pose a danger to consumers, and the Opposition offers no such limiting principle. No matter how creative Respondents are in crafting their prayer for relief, they cannot avoid the conflict that their underlying theory of liability presents.

The unprecedented nature of the decision below, the novel exercise of state judicial power it endorses, and the threat that disparate state regulation poses to numerous aspects of federal wireless policy clearly justify this Court's intervention. CTIA Br. 9-20. Moreover, if the Court has any doubt about the position of the United States and the FCC on these issues, it should call for the views of the Solicitor General. The Opposition cannot deny that those views have doctrinal relevance here, Pet. 24-

25, nor can it deny that the FCC took the extraordinary step of attempting to file a brief in support of rehearing *en banc* in the court below, App. 184a, which was thwarted only because the court denied the petition on the very day the brief was to be filed. Opp. 13 n.8.

2. The Opposition does not and again cannot deny that the Petition presents important questions regarding the meaning and application of the "presumption against preemption," a *threshold issue* in every federal preemption case. It is an issue upon which the district court and the panel opinion came to diametrically opposed conclusions. The Opposition does not even attempt to address the substantial conflict in the circuits over what constitutes "a history of significant federal presence" and at what level of generality the "area" of regulation should be defined.[1] Pet. 26 n.6; PLAC Br. 7-13. As PLAC points out, that confusion runs so deep that the Ninth Circuit has held that interstate communication *by wire* (*e.g.*, traditional "long distance" calls) is an area where the *Locke* exception applies, while the Fourth Circuit has concluded that interstate communication *by radio* is an area that falls outside the reasoning of *Locke*. *Compare Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003), *with* Pet. App. 34a-35a & 34a n.4.

Respondents play a level of generalities game with *Locke* to avoid the otherwise inevitable conclusion that the regulation of interstate communication by radio frequency emissions qualifies for the *Locke* exception. Respondents characterize the

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1. The application and meaning of *Locke* recently divided a panel of the Ninth Circuit, *compare Air Conditioning and Refrigeration Inst. v. Energy Res. Conservation Ass'n*, 410 F.3d 492, 496 (9th Cir. 2005), *with id.* at 506 (Noonan, J. dissenting). This decision has resulted in another petition for certiorari asking the Court to clarify its jurisprudence surrounding the so-called "presumption against preemption." Petition for a Writ of Certiorari, *Air Conditioning and Refrigeration Inst. v. Energy Res. Conservation Ass'n*, No. 05-331 (U.S. filed Sept. 12, 2005).

state interest behind their lawsuits in absurdly capacious terms: "State and local *health and safety regulation* has been applied to *consumer products* for decades," Opp. 24 (emphasis added). By contrast, they define the area of potential significant federal presence as narrowly as possible. *Id.* ("the FCC did not begin regulating" the *RF radiation* from "*hand-held cellular telephones*" until 1996) (emphasis added).[2] Thus, Respondents' own brief vividly demonstrates how the outcome of the *Locke* analysis can be manipulated by the manner in which the two poles of the question are defined.

3. Respondents have no response to the Petition's showing that the Fourth Circuit's opinion conflicts with the decisions of this Court with respect to agency conflict preemption. Pet. 18-19. As the Petition explains, the Fourth Circuit's decision cannot be reconciled with the Court's cases, which hold that in agency conflict preemption "'a narrow focus on Congress' intent to supersede state law [is] misdirected.'" Pet. 19 (quoting *City of New York v. FCC*, 486 U.S. 57, 64 (1988)); *see also* Chamber Br. 8-9. Respondents appear to back away from the full import of the Fourth Circuit's holding, but still contend that the presence of an expressly preemptive statute "implies that matters beyond that reach are not pre-empted." Opp. 22 (quotation omitted) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) and citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)). However, as Respondents themselves grudgingly

2. On this point, the Opposition is wrong as a factual matter. The FCC's "categorical exclusion" of wireless handsets from its first RF rules in 1985 was not based on a lack of authority or an intent to leave the regulation of such devices to the states, as the Opposition insinuates. Opp. 3. In fact, such devices were excluded from complying with specific rules for emissions evaluation "based on calculations and measurement data indicating that they would not cause exposures that would violate the ANSI guidelines under normal and routine conditions of use." *Guidelines for Evaluating Environmental Effects of Radiofrequency Radiation*, 8 F.C.C.R. 2849, 2849, ¶ 5 (1993).